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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. RAYMOND A. FLORES et al., Defendants and Appellants.	B233196 (Los Angeles County Super. Ct. No. TA112752)

APPEALS from judgments of the Superior Court of Los Angeles County. Eleanor J. Hunter, Judge. Affirmed.

Maxine Weksler, under appointment by the Court of Appeal, for Defendant and Appellant Raymond A. Flores.

John L. Staley, under appointment by the Court of Appeal, for Defendant and Appellant Pedro Frias.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle and Eric J. Kohm, Deputy Attorneys General for Plaintiff and Respondent.

Defendants and appellants Pedro Frias (Frias) and Raymond Anthony Flores (Flores) (collectively defendants) appeal from their robbery convictions. Flores contends: insufficient evidence supported the convictions and the finding that the robberies were gang related; the identification evidence was unreliable; a sleeping juror rendered the trial unfair; he was prejudiced by the identification of a trial spectator as a gang member; the gang expert's opinion should have been excluded; insufficient evidence supported the finding that Flores personally used a firearm; the trial court's sentencing choices were an abuse of discretion; and the sentence was cruel or unusual under the California and United States Constitutions. Frias contends: the trial court abused its discretion in imposing consecutive sentences and refusing to strike the prior conviction and gang enhancements; the sentence was cruel or unusual; and the convictions and gang findings were not supported by substantial evidence. In addition, each defendant joins in his codefendant's contentions to the extent that they accrue to his benefit.

We conclude that none of defendants' assignments of error have merit, and we affirm the judgments.

BACKGROUND

1. Procedural background

Defendants were charged with three counts of second degree robbery in violation of Penal Code section 211.[1] The information specially alleged that a principal and each defendant personally used and intentionally discharged a firearm in the commission of the offense, within the meaning of section 12022.53, subdivisions (b), (c), and (e)(1); and that the crimes were gang related as defined in section 186.22, subdivision (b)(1).

The information further alleged that Flores suffered a prior serious felony conviction within the meaning of the "Three Strikes" law of sections 1170.12, subdivisions (a) through (d), and 667, subdivisions (b) through (i), and within the

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[1] All further statutory references are to the Penal Code, unless otherwise indicated.

meaning of section 667, subdivision (a)(1); and that he served a prior prison term within the meaning of section 667.5, subdivision (b).

Following a jury trial defendants were convicted as charged and the jury found true the firearm and gang enhancement allegations. On May 19, 2011, after Flores admitted his 2009 robbery conviction and prison term, the trial court denied his motion for new trial, sentenced both defendants, imposed mandatory fines and fees, and awarded custody credit.

The trial court sentenced Flores to the high term of five years in prison as to count 1, doubled as a second strike to 10 years, plus 20 years for a principal's gun discharge under section 12022.53, subdivisions (c) and (e)(1), and a 10-year gang enhancement (§ 186.22, subd. (b)). The trial court imposed consecutive terms as to each of counts 2 and 3 as follows: one-third the middle term, doubled to two years, one-third the weapon enhancement (six years six months), and one-third the gang enhancement (three years three months), for a total as to each count of 11 years 9 months. In addition, the trial court imposed five years due to the prior conviction under section 667.5, subdivision (a), for a total sentence of 68 years 6 months in prison.

The court sentenced Frias to a total of 54 years 6 months in prison. The sentence as to count 1 was comprised of the middle term of three years, plus a 20-year enhancement under section 12022.53, subdivision (c), for personally and intentionally discharging a gun, and a 10-year gang enhancement. The trial court imposed consecutive terms as to each of counts 2 and 3 as follows: one-third the middle term (one year), one-third the gun discharge enhancement (six years six months), and one-third the gang enhancement (three years three months), for a total as to each count of 10 years 9 months.

Both defendants filed timely notices of appeal.

2. Prosecution evidence

The robbery

In the early evening of May 17, 2010, four young men, Robert Rodriguez (Rodriguez), brothers Moises (Moises) and Jesus Pestana (Jesus), and Octavio Tapia (Tapia), stood conversing in front of an apartment building in Lynwood. Defendants

approached the four in a two-tone white Lexus automobile with special rims, driven by a woman. As the car stopped near the four young men, one of the occupants asked where they were from. Believing that defendants were asking about their gang affiliation, all four gave replies indicating that they were not gang members. Defendants then emerged from the Lexus and ordered the four to empty their pockets.

When the four companions failed to comply immediately, Frias told Flores to pull out "the gun"; Flores took out a gun and pointed it at Moises before passing it to Frias, who pointed it toward both Moises and Tapia. While Frias pointed the gun both defendants reached into the companions' pockets and demanded the contents. Frias took Tapia's cell phone and Moises's wallet. Frias pulled a receipt and a dollar from Jesus's pocket and put them in his own pocket, while holding the gun. Rodriguez took out a 99-Cent Store receipt, the only thing he had in his pocket; Frias demanded the receipt but threw it on the ground after Rodriguez gave it to him.

Rodriguez, Tapia, Moises, and Jesus were all frightened during the brief incident. As they fled, Frias fired the gun three times toward the apartment building, hitting the side of the building, while one or both defendants yelled, "Compitas."

Identification evidence

Rodriguez recognized defendants from school, although he had not seen them in several years. Rodriguez did not know defendants' real names, but knew their nicknames, "Lucky" and "Casper." Rodriguez selected Frias's photograph from a six-person photographic lineup (six-pack) three days after the robbery, but was unable to identify a photograph of Flores. Rodriguez identified both defendants in court as the perpetrators, and testified that he was certain. Tapia also remembered defendants from school and recognized them as soon as they got out of the Lexus. He selected both defendants' photos from photographic lineups three days after the robbery, and he identified them later in court. Moises selected Frias from a photographic lineup, and identified both defendants in court. Jesus testified that he had been too frightened to identify anyone in the photographic lineup, but he did identify both defendants in court as the perpetrators.

Rodriguez told investigators that Flores had tattoos on his neck and chest. At trial, Rodriguez reviewed photographs of Flores and identified the tattoo above Flores's left eyebrow and the tattoos on Flores's neck as those he had seen during the robbery. Tapia and Moises also testified that Flores had tattoos on his head and neck, and Moises identified the neck tattoo in Flores's photograph. Jesus testified that he saw a tattoo on the back of Frias's head and a tattoo on Flores's face, near his left eye.

Los Angeles County Sheriff Detective Oscar Veloz led the investigation in this case. From a liquor store security camera near the crime scene, Detective Veloz obtained a photograph of a white Lexus passing around the time of the robbery. At trial, Tapia, Moises, and Jesus confirmed the surveillance photograph depicted defendants' car. Detective Veloz located the car three weeks later near Frias's Lynwood home while other sheriff deputies executed a search warrant. The car was registered to Roxanna Sanchez, Frias's girlfriend and mother of his young son. Tapia's cell phone was among the things found in Frias's bedroom during the search.

About two weeks after the robbery, Detective Veloz interviewed Flores, who admitted that he belonged to the Lynwood Compitas gang, and that he was called Lucky.

Gang evidence

Sheriff Detective Fernando Sarti testified as the prosecution's gang expert. He was familiar with the Compitas gang as he had investigated it for years as a patrol deputy and gang detective. He testified that the Compitas gang was a criminal street gang with approximately 50 members, who regularly committed such crimes as petty theft, vandalism (marking territory), robberies, assaults, and murders, all of which were the gang's primary activities. Detective Sarti also presented certified court documents showing that Compitas gang member Carlos Jimenez (Jimenez) was convicted in 2009 of two counts of robbery and one count of assault with a deadly weapon, and that Compitas gang member Fernando Rios (Rios) was convicted in 2008 of unlawful possession of a loaded firearm. Compitas gang's signs or symbols were "CPTS," "LVCPTS," and "C."

The Compitas gang was territorial and considered several other gangs in the area as its rivals. Detective Sarti described the special significance that respect held in gang

culture, including the Compitas gang, and explained how a gang's reputation for violence was important. Detective Sarti defined the term to "put in work" as committing crimes for the benefit of the gang and noted that a gang member could earn greater respect by using a gun to commit his crime. Detective Sarti testified that gang members usually committed crimes in view of another gang member; and usually identified their gang so that word of the crimes would spread in the community and create fear. Community fear of the gang was important because it discouraged people from reporting crimes and provided protection against incursions by rival gangs. A gang member could put in work by shooting a gun and yelling out the name of the gang.

Detective Sarti explained the field identification cards on which sheriff's deputies recorded their contact with a gang member, noting such information as the gang member's name, address, height, weight, any visible tattoos, the name of his gang, his moniker, associates, and whether other gang members were with him at the time of the contact. Detective Sarti presented two such cards regarding Flores, one dated May 13, 2010, indicating Flores admitted his membership in the Compitas gang. The other was prepared on May 17, 2010, when Detective Sarti and another deputy sheriff contacted Flores while he was in the company of Frias. Flores admitted his gang affiliation to Detective Sarti.

Detective Sarti also presented six cards regarding Frias, prepared on dates ranging from March 4, 2008 to May 17, 2010. All six cards reflected that Frias admitted his membership in the Compitas gang. Flores's tattoos were noted on the field identification card prepared May 17, 2010. Detective Sarti identified Flores's tattoos in photographs. "Compitas" appeared on Flores's arm, "LWD" appeared on the back of his head, and "Lynwood" appeared on this face, above his left eyebrow. "CPTS" and "R.I.P. Lil Menace" was tattooed behind Flores's ear. Detective Sarti explained that Little Menace was a Compitas gang member, that LWD stood for Lynwood, and CPTS stood for Compitas.

Detective Sarti was familiar with Frias and Flores from several past contacts and from speaking to other deputies at the Sheriff's Century Station. Frias's moniker was

Casper and Flores's was Lucky. Detective Sarti knew of no other active Compitas gang member who, like Frias, was bald with no eyebrows. In Detective Sarti's opinion, both defendants were active members of the Compitas gang at the time of the robbery. Detective Sarti explained that although gang members could give up their membership, such as by moving out of the area and never returning or associating with other gang members, one who committed robberies, yelled out his gang name, or shot a gun in the company of another gang member would be an active gang member, not a former gang member.

In response to a hypothetical question tracking the facts in evidence, Detective Sarti expressed his opinion that the crimes were committed for the benefit of the Compitas gang. Although he based his opinion upon the totality of the circumstances, he found special significance in the commission of a violent crime, the identification of Compitas before leaving the scene, and the initial question, "Where are you from?"

3. Defense evidence

Gregorio Estevane (Estevane) testified as the defense gang expert. Estevane testified regarding his knowledge of gang culture and gave his opinion that like the majority of crimes committed by gang members, the crimes charged in this case were personal, not committed for the benefit of the gang. He based this opinion on the fact there was no evidence that the crimes were directed or planned by the gang leadership, no one was killed, the items stolen had little value, and the crimes were unlikely to cause fear of the gang in the community. Estevane also testified that the number one rule of gang culture, under threat of death, was that gang members did not admit their membership to law enforcement or communicate with the police. He also described the California Gang database as a method by which law enforcement kept track of suspected gang members by inputting both reliable and unreliable information. Estevane further testified that a gang member could leave the gang but still live in the neighborhood, and that those who moved out of the gang's territory were no longer active members of the gang.

Hailly Korman (Korman), a lawyer and former elementary school teacher, testified that she had known Frias since he was 12 years old. In 2009, Frias, his girlfriend and son left Lynwood and went to live in Korman's home. Korman helped him find a job and paid his tuition at Los Angeles Trade Tech College. Korman did not know Frias to be a gang member, claimed she had never heard of Compitas, and did not know that Frias's tattoos were gang related. She denied that Frias's nickname, Casper, was gang related, and claimed that his brothers had called him that because he had alopecia, which caused him to lose his hair. She knew that "Menace" was the nickname of Frias's brother Raymond, who was killed two years before.

DISCUSSION

I. Substantial identification evidence

Defendants contend the identification evidence was too unreliable to constitute substantial evidence and thus failed to establish their identity as the perpetrators. They base their contention on three major points: each witness gave inconsistent testimony; stress and fear diminished the witnesses' ability to remember faces or tattoos; and the procedure followed by Detective Veloz in obtaining photographic identifications was flawed.

With regard to the witnesses' stress and fear, Flores cites several articles of behavioral studies and identification procedures, and asks that we reevaluate the witnesses' identification in light of the principles therein discussed. Flores did not present the testimony of an identification expert at trial, and there is no record of the submission of such studies and articles in the trial court. Also, Flores did not object to the procedures followed by Detective Veloz. Thus, the record is not sufficiently developed to permit application of the points urged by Flores to this case. Flores has failed to adequately preserve the identification issues for review. (*People v. Cunningham* (2001) 25 Cal.4th 926, 989.)

Further, we reject Flores's contentions to the extent they advocate a rule that eyewitness testimony cannot constitute substantial evidence where witnesses were fearful and stressed, forgetful of some details and mistaken about others, and where the trial

court did not, on its own motion, require the prosecution to establish that specific procedures were followed. We must apply the usual substantial evidence test of *People v. Johnson* (1980) 26 Cal.3d 557, and *Jackson v. Virginia* (1979) 443 U.S. 307, to eyewitness identification. (*People v. Cuevas* (1995) 12 Cal.4th 252, 274-275, 277.)

We thus turn to defendants' argument that the eyewitness testimony was too inconsistent to constitute substantial evidence. Defendants provide a summary of the conflicts and weaknesses in the testimony of the victims and contend that their inconsistent testimony did not constitute substantial evidence. For example, defendants point to testimony and statements to investigators in which one or more of the witnesses changed their descriptions of the robbers' clothing and the car in which they traveled; in which Flores's above-the-eye tattoo was misidentified as reading "CPTS" when in fact, it was the neck tattoo that read "CPTS" while the above-the-eye tattoo read "Lynwood"; failed to tell investigators that they recognized the two assailants, but so testified at trial; failed to select a photograph from the photographic lineup, while thereafter identifying defendants with certainty at trial; and failed to remember which defendant had a tattoo on his neck.

As respondent observes, we do not reweigh the evidence or resolve conflicts in the evidence. (*People v. Young* (2005) 34 Cal.4th 1149, 1181.) We "review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence -- that is, evidence which is reasonable, credible, and of solid value - such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson*, *supra*, 26 Cal.3d at p. 578; see also *Jackson v. Virginia*, *supra*, 443 U.S. at pp. 318-319.)

"Weaknesses and inconsistencies in eyewitness testimony are matters solely for the jury to evaluate. [Citation.]" (*People v. Allen* (1985) 165 Cal.App.3d 616, 623.)[2]

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[2] Flores acknowledges that the trial court thoroughly instructed the jury with CALCRIM No. 315, listing 15 questions jurors must consider in evaluating identification testimony. And as respondent observes, defense counsel extensively cross-examined the

"[A]bsent physical impossibility or inherent improbability, the testimony of a single eyewitness is sufficient to support a criminal conviction. [Citation.] '"To warrant the rejection of the statements given by a witness who has been believed by a trial court, there must exist either a physical impossibility that they are true, or their falsity must be apparent without resorting to inferences or deductions. [Citations.] Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.]"' [Citations.] Further, a jury is entitled to reject some portions of a witness's testimony while accepting others. [Citation.]" (*Ibid.*; see also *People v. Young*, *supra*, 34 Cal.4th at p. 1181.)

We thus decline to second-guess the jury's resolution of the conflicts and inconsistencies, or reevaluate the evidence due to weaknesses cited by defendants. Regardless, we find that defendants' summaries are exaggerated. Rodriguez and Moises were able to select Frias's photograph after the robbery, and all three victims identified both defendants in court. Tapia also identified defendants in court and prior to seeing them in court, by selecting their photographs from a photographic lineup three days after the robbery. As defendants have failed to demonstrate that Tapia's identifications of both defendants were physically impossible or inherently improbable, his testimony alone provides substantial evidence of defendants' identities. (See *In re Gustavo M.* (1989) 214 Cal.App.3d 1485, 1497; *People v. Allen*, *supra*, 165 Cal.App.3d at p. 623.)

In addition, the identification evidence was not weak simply because there were conflicts. As Detective Veloz explained, when there are multiple victims and multiple perpetrators, the witnesses' descriptions will not be identical. Here however, the victims' recollections were remarkably consistent and similar in important details. All witnesses saw a tattoo on Flores's face, although they misread it and remembered his larger neck

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witnesses and detailed the conflicts and weaknesses of their identification testimony at length in summation.

tattoo instead. Deputy Angel Banuelos testified that when he interviewed the victims shortly after the robbery, Rodriguez, Moises, and Jesus reported seeing a tattoo on Flores's face. Detective Veloz testified that Rodriguez and Jesus told him the day after that they saw a tattoo on defendant's face. Far from demonstrating impossibility or inherent improbability, such circumstances support the witnesses in-court identifications.

Further, the evidence against Frias was overwhelming, and the evidence that Flores was his coperpetrator was also very strong. As respondent notes, Frias was uniquely identifiable by his lack of eyebrows. The robbery was committed by at least one Compitas gang member and both Frias and Flores were active Compitas gang members. Frias used his girlfriend's Lexus, and Tapia's cell phone was later found in Frias's bedroom. Detective Sarti had seen Flores in the company of Frias the morning of the robbery when he had noted the tattoo above Flores's left eyebrow.

Having reviewed the entire record, we conclude that substantial evidence supported the identification of Flores and Frias as the robbers, such that a reasonable jury could find them guilty beyond a reasonable doubt. (See *People v. Johnson*, *supra*, 26 Cal.3d at p. 578; *People v. Allen*, *supra*, 165 Cal.App.3d at p. 623.)

II. Substantial evidence supported the robbery

Flores contends that his conviction for the robbery of Rodriguez was not supported by substantial evidence. Flores argues that the evidence was insufficient to establish the "felonious taking" element of robbery because the 99-Cent Store receipt taken from Rodriguez had insufficient value.

"Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." (§ 211.) Flores acknowledges that the value of the item taken may be slight (see *People v. Simmons* (1946) 28 Cal.2d 699, 705), but he contends that the prosecution was required to prove that the property had *some* value. Flores's contention is without merit. "If the other elements are satisfied, the crime of robbery is complete without regard to the value of the property taken. [Citations.]" (*People v. Tafoya* (2007) 42 Cal.4th 147, 170; see also *People v. Clark* (2011) 52 Cal.4th 856, 943.)

Substantial evidence supports the other elements of robbery, and Flores does not argue otherwise. Flores handed Frias a gun which Frias held while demanding the contents of the victims' pockets. A demand at gunpoint is force. (See *People v. Burney* (2009) 47 Cal.4th 203, 251.) Because Rodriguez was frightened by the gun, he complied with the demand by taking the receipt from his pocket which Frias then took from him. In sum, Rodriguez's receipt was taken from his person or immediate presence and against his will by means of both force and fear. The elements of robbery were thus established, and the value of the receipt is of no consequence. (*People v. Tafoya, supra,* 42 Cal.4th at p. 170; see also *People v. Clark, supra,* 52 Cal.4th at p. 943.)

III. No evidence of an inattentive juror

Defendants contend that Juror No. 1 fell asleep twice during the trial. Flores contends that the trial court was required to conduct a sua sponte inquiry into whether Juror No. 1 was paying adequate attention.

A juror who is found to be unable to perform his or her duties may be discharged. (§ 1089.) "'Once a trial court is put on notice that good cause to discharge a juror may exist, it is the court's duty "to make whatever inquiry is reasonably necessary" to determine whether the juror should be discharged. [Citation.] . . . [H]owever, . . . the mere suggestion of juror "inattention" does not require a formal hearing disrupting the trial of a case. [Citation.]' [Citation.] [¶] '"The decision whether to investigate the possibility of juror bias, incompetence, or misconduct -- like the ultimate decision to retain or discharge a juror -- rests within the sound discretion of the trial court. [Citation.] The court does not abuse its discretion simply because it fails to investigate any and all new information obtained about a juror during trial."' [Citation.] A hearing is required only where the court possesses information which, if proved to be true, would constitute 'good cause' to doubt a juror's ability to perform his or her duties and would justify his or her removal from the case. [Citation.]" (*People v. Bradford* (1997) 15 Cal.4th 1229, 1348.)

During Tapia's testimony regarding the photographic lineups, the trial court asked Juror No. 1, "You okay back there?" The juror replied, "Yes, ma'am." The court did not

give a reason for questioning the juror and no further mention was made of the incident at that time. As defendants did not request further inquiry and no declarations were submitted in support of the motions for new trial, it remains unknown whether the juror was asleep or if he was asleep, whether his condition was more than momentary.

The issue was first raised in Frias's motion for new trial, in which Flores joined. Frias's counsel represented that Juror No. 1 had fallen asleep "multiple times" and that the bailiff woke him up twice. The trial court observed that counsel's representations were "pure speculation," noting that it had watched Juror No. 1 closely and saw nothing else that would indicate that Juror No. 1 was not paying attention or evaluating the evidence.

Counsel's representations have not become more certain here. The only evidence of sleeping consists of counsel's representations while the juror himself claimed to be "okay." Speculation by counsel that a juror was sleeping falls short of good cause to require the court to conduct further inquiry. (*People v. Espinoza* (1992) 3 Cal.4th 806, 821.) No hearing is necessary when the court's observations reveal that no juror was sleeping (*People v. DeSantis* (1992) 2 Cal.4th 1198, 1234), or when the evidence does not show that the sleeping continued for a significant period. (*People v. Bradford*, *supra*, 15 Cal.4th at pp. 1348-1349.)

The federal cases on which Flores relies do not hold otherwise. (E.g., *United States v. Springfield* (9th Cir. 1987) 829 F.2d 860 (*Springfield*); *United States v. Barrett* (9th Cir. 1983) 703 F.2d 1076 (*Barrett*); *United States v. Hendrix* (9th Cir. 1977) 549 F.2d 1225.) Nor do the cases hold, as Flores claims, that a trial judge may not take judicial notice that a juror was not asleep during the trial. Only *Barrett* discussed the issue. There, the federal appeals court merely held that *under the particular circumstances* of that case, where a juror *admitted* sleeping during trial and asked to be removed, the trial judge was required to investigate further and could not take judicial notice contrary to the evidence. (*Barrett*, *supra*, at pp. 1082-1083.) Here by contrast, there was no evidence that Juror No. 1 was sleeping. Thus the trial court did not abuse its

discretion in making no inquiry. (See *People v. Bradford*, *supra*, 15 Cal.4th at p. 1351; *People v. Espinoza*, *supra*, 3 Cal.4th at p. 821.)

Moreover, if the juror had fallen asleep just before the trial court spoke to him, there could be no harm to either defendant. The prosecutor was questioning Tapia about the photographic lineup. Just before the judge spoke to the juror, Tapia had authenticated his initials on the six-pack of photographs, as well as the admonishment attached to it, and confirmed that he had circled photograph No. 1. Even if the juror missed this authentication, it is clear from the record that the juror was awake when Tapia testified that he wrote on the six-pack, "This is the one that took my phone, and the one that shoot [*sic*] the gun." Tapia then identified Frias in court as that person. Tapia went on to authenticate the photographic lineup in which he selected Flores's photograph shortly after the robbery, and then identified Flores in court. Tapia's out-of-court photographic identification of Frias did not conflict with his in-court identification. Assuming Juror No. 1 had a moment of inattention, whatever the reason, it clearly did not cause him to miss essential testimony; and even if the authentication were deemed essential, Tapia's in-court identification was sufficient by itself to sustain the conviction. (*In re Gustavo M.*, *supra*, 214 Cal.App.3d at p. 1497.)

IV. Substantial evidence of gang allegation

Defendants contend that the gang finding under section 186.22, subdivision (b)(1), was unsupported by substantial evidence. In particular, Flores contends that the evidence of a pattern of criminal activity was insufficient to establish that Compitas was a criminal street gang, that an insufficient foundation was laid for the gang expert's testimony, and that the gang expert's opinion usurped the jury's factfinding function. Flores also contends that the California Supreme Court enunciated a new evidentiary standard to review gang findings and that its application here would violate the ex post facto clause of the United States Constitution.

A gang finding is reviewed under the same substantial evidence standard as any other conviction. (*People v. Ochoa* (2009) 179 Cal.App.4th 650, 657 (*Ochoa*).) We review the whole record in the light most favorable to the jury's true finding, presuming

in support of the judgment the existence of every fact the jury could reasonably deduce from the evidence, to determine whether the finding is supported by "substantial evidence -- that is, evidence that is reasonable, credible, and of solid value -- from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.]" (*People v. Albillar* (2010) 51 Cal.4th 47, 59-60 (*Albillar*).)

A gang finding has two prongs: (1) the crime was committed for the benefit of, at the direction of, or in association with any criminal street gang; and (2) the crime was committed with the specific intent to promote, further, or assist in any criminal conduct by gang members. (*People v. Villalobos* (2006) 145 Cal.App.4th 310, 322 (*Villalobos*); see *Albillar*, *supra*, 51 Cal.4th at pp. 67-68; § 186.22, subd. (b).) The jury may reasonably infer the association element of the first prong from the very fact that the defendant committed the charged crime with another gang member, unless there is evidence that the gang members are "on a frolic and detour unrelated to the gang." (*People v. Morales* (2003) 112 Cal.App.4th 1176, 1198 (*Morales*); see also *Albillar*, at pp. 61-62, 67-68.)

A. Expert testimony established a pattern of criminal activity

A "'criminal street gang' means any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more [enumerated] criminal acts, . . . having a common name or common identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity." (§ 186.22, subd. (f).) A "'pattern of criminal gang activity' means the commission of . . . two or more of the [predicate] offenses . . . committed on separate occasions, by two or more persons" within a specified time period. (§ 186.22, subd. (e); see also *People v. Gardeley* (1996) 14 Cal.4th 605, 616, 620-621 (*Gardeley*).) The predicate offenses need not be gang related. (*Gardeley*, at p. 621.) Currently charged offenses will qualify as predicate offenses if committed with a gang member. (*People v. Loeun* (1997) 17 Cal.4th 1, 5, 8-9.)

Flores does not challenge Detective Sarti's testimony regarding the name of the gang or its common identifying sign or symbol. He concedes that assault with a deadly weapon and unlawful possession of a firearm, the crimes committed by Jimenez and Rios, were among the offenses enumerated in subdivision (e) of section 186.22, and that they were adequately proven. Flores contends that the evidentiary insufficiency was because Detective Sarti's opinion that Jimenez and Rios were Compitas gang members was based upon the hearsay admissions of the two men, made to Detective Sarti and other deputies. Flores also challenges Detective Sarti's qualifications to give an expert opinion with regard to gang membership.

Defendants did not raise either objection in the trial court. A defendant may not make a hearsay objection or challenge the lack of foundation for the first time on appeal. (*People v. Dennis* (1998) 17 Cal.4th 468, 530.) Nor may he object to an expert's opinion for the first time on appeal. (*People v. Zepeda* (2001) 87 Cal.App.4th 1183, 1208.) Further, as defendants did not raise any objection to Detective Sarti's qualifications as an expert at trial, they may not do so here. (*People v. Gonzalez* (2006) 38 Cal.4th 932, 948 (*Gonzalez*).) The trial court's admission of expert testimony is reviewed for an abuse of discretion. (*People v. Williams* (1997) 16 Cal.4th 153, 196-197.) It is axiomatic that the trial court cannot be found to have abused discretion it was never asked to exercise. (*People v. Burns* (1987) 196 Cal.App.3d 1440, 1455.) Thus, as neither defendant objected to Detective Sarti's qualifications or moved to exclude his opinion or his testimony regarding the predicate offenses and the membership status of Jimenez and Rios, we need not address those issues.

Moreover, the contentions have no merit. It is well settled that a gang expert may rely on material that is ordinarily inadmissible, such as hearsay, as long as the expert's information is reliable. (*Gonzalez, supra*, 38 Cal.4th at p. 949; *Gardeley*, *supra*, 14 Cal.4th at p. 618; *People v. Hill* (2011) 191 Cal.App.4th 1104, 1121-1123 (*Hill*).) Thus, a gang expert may rely on admissions by gang members, as well as information obtained from colleagues and other law enforcement agencies. (*Gonzalez*, at p. 949; *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1370.)

Reliability may be apparent from the expert's many years of experience in conducting investigations of gang members and the use of multiple sources of information. (*Gonzalez, supra,* 38 Cal.4th at p. 949.) Reliability was established here in the same manner. Detective Sarti's opinion that Jimenez was a Compitas gang member was based on information obtained from numerous other deputies as well as Jimenez's admission to the detective himself. Detective Sarti had personally arrested Rios on the predicate offense of unlawful possession of a firearm, and Rios admitted to him that he was an active Compitas gang member. Detective Sarti had been a deputy sheriff for 13 years with extensive experience with gangs in general and the Compitas gang in particular.

We find no abuse of discretion. Substantial evidence established that the predicate crimes were committed by members of the Compitas gang.

B. Defendants' gang association was supported by substantial evidence

Defendants further contend that the evidence was insufficient to prove that they were gang members. Flores challenges the reliability of Detective Sarti's opinion that he and Frias were members of the Compitas gang, criticizing the methodology used by law enforcement in identifying gang membership, which he describes as highly subjective and unverifiable.

There is no requirement in California that the prosecution show the gang expert's overall methodology to be reliable. (*Hill, supra,* 191 Cal.App.4th at pp. 1123-1124.) A gang expert's testimony alone is sufficient to find an offense gang related so long as there was '"an underlying evidentiary foundation'" for the testimony. (*People v. Galvez* (2011) 195 Cal.App.4th 1253, 1261.)

Here defendants' gang membership was adequately proven by Detective Sarti's opinion, supported by the field identification cards admitted into evidence without objection. Detective Sarti presented two field identification cards prepared in May 2010, reflecting Flores's self-admission of his membership in the Compitas gang, including one time when Detective Sarti was present. This was the same occasion where Frias was also present and also admitted his gang membership, which confirmed that each defendant

knew the gang membership of the other. Detective Sarti also presented five other field identification cards regarding Frias, from 2008-2010, reflecting that Frias admitted his membership in the Compitas gang. In addition, Detective Sarti was personally familiar with Frias and Flores from several past contacts. Thus Detective Sarti's opinion that both defendants were active members of the Compitas gang at the time of this robbery was amply supported by the evidence.

Flores contends that neither Detective Sarti's testimony nor the field identification cards provided substantial evidence of defendants' gang membership because there were no arrests or descriptions of criminal activity on the cards. Flores also contends that Detective Sarti's testimony was speculative and unreliable because some parts conflicted both internally and with other evidence, as well as with testimony given by the defense gang expert. We reject defendants' invitation to reweigh the evidence and resolve evidentiary conflicts. It was for the jury to evaluate the opinions of the experts, assign appropriate weight, resolve conflicts, and to accept or reject all or part of the opinions. (§ 1127b; *People v. Bean* (1988) 46 Cal.3d 919, 933; *People v. Gentry* (1968) 257 Cal.App.2d 607, 611-612.) Expert opinion is a form of circumstantial evidence. (*People v. Gentry*, at p. 611.) A finding supported by substantial evidence will not be set aside merely because the circumstances might also be reasonably reconciled with a contrary finding. (*People v. Kraft* (2000) 23 Cal.4th 978, 1053-1054.)

In sum, substantial evidence supported a finding that each defendant was a member of the Compitas gang when they committed the robberies together and knew that the other defendant was a gang member. The second prong of the gang enhancement was thus established, and the jury could reasonably infer from the same evidence that the crimes were committed in association with the gang. (See *Albillar*, *supra*, 51 Cal.4th at pp. 62, 68; § 186.22, subd. (b).) Further, substantial evidence demonstrated that defendants committed the crimes by actively assisting each other in such a way that would benefit the gang. Detective Sarti testified that putting in work for the gang included shooting and identifying the gang, thus benefitting the gang by creating fear in the community to discourage people from reporting crimes and provide protection against

rival gangs. Here one defendant fired a weapon and one or both of them yelled, "Compitas." We conclude that substantial evidence thus established both prongs of the statute. (§ 186.22, subd. (b); see *Albillar*, at pp. 61-62, 67-68; *Villalobos*, *supra*, 145 Cal.App.4th at p. 322; *Morales, supra,* 112 Cal.App.4th at p. 1198.)

C. Conflicting inferences do not render the evidence insubstantial

With no analysis, Frias contends that the jury could have inferred that the crimes were committed for his personal benefit because it was not established which defendant yelled, "Compitas," which might have been done as "mere bravado" rather than supportive of the gang. We have already determined that the jury's findings were supported by substantial evidence. An argument that "'the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment. [Citation.]' [Citation.]" (*People v. Thomas* (1992) 2 Cal.4th 489, 514.)

D. No ex post facto violation

Flores contends that in *Albillar, supra*, 51 Cal.4th 47, the California Supreme Court lowered the evidentiary standard in a newly enunciated construction of section 186.22, subdivision (b).[3] Flores further contends that application of the new standard here would violate the Ex Post Facto Clause of the United States Constitution. Quoting *Beazell v. Ohio* (1925) 269 U.S. 167, Flores argues that we should not follow *Albillar* and need not be constrained by principles of stare decisis, because "any statute which punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed, is prohibited as *ex post facto*." (*Beazell v. Ohio*, *supra*, at pp. 169-170.)

Although Flores fails to describe an alleged newly enunciated crime or punishment, he is apparently challenging the rule that a reasonable inference that the

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[3] We reject Flores's suggestion that the California Supreme Court held that a gang finding may be established with "merely a scintilla of evidence."

crimes were committed in association with the gang (first prong) may be drawn from evidence that the defendant committed the crime with a known gang member (second prong). (See *Albillar*, *supra*, 51 Cal.4th at pp. 62, 68; § 186.22, subd. (b).) Flores argues that "the *Albillar* majority ignored the 'plain language' rule of statutory construction by interpreting the singular 'gang,' in the first prong, and plural 'gang members,' in the second prong, to mean the same thing." Flores relies on Justice Werdegar's separate opinion in *Albillar* in which she described the majority interpretation as creating a "redundancy" and "collaps[ing] the requirement of the second prong of section 186.22, subdivision (b) . . . with the requirement of the first prong . . . ." (*Albillar*, *supra*, at p. 73 (conc. & dis. opn. of Werdegar, J.).)

The inference criticized by Flores and Justice Werdegar was not newly enunciated in *Albillar*. Appellate courts have drawn such an inference before *Albillar* was published and before defendants committed the current crimes in 2010. (E.g., *Ochoa*, *supra*, 179 Cal.App.4th at p. 661, fn. 7; *People v. Leon* (2008) 161 Cal.App.4th 149, 162; *People v. Martinez* (2008) 158 Cal.App.4th 1324, 1332; *Morales*, *supra*, 112 Cal.App.4th at p. 1198.) Indeed, prior to defendants' crimes, courts had rejected the argument that drawing such an inference was "circular" -- an argument similar to Justice Werdegar's "redundancy" comment. (E.g., *People v. Leon*, at p. 163; *Morales*, at p. 1198.) As our Supreme Court did not create a new crime or punishment in *Albillar*, and no ex post facto violation occurred here (see *Beazell v. Ohio*, *supra*, 269 U.S. at pp. 169-170), we are not relieved from the requirement of following *Albillar*. (See *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450 (*Auto Equity Sales*).)

E. The expert did not usurp the jury's factfinding function

Flores contends that the evidence was insufficient because Detective Sarti drew inferences in his testimony that should have been left to the jury.

Detective Sarti testified about gang culture and gave opinions based upon his knowledge and experience in the form of answers to hypothetical questions. "It is well settled that expert testimony about gang culture and habits is the type of evidence a jury may rely on to reach a verdict on a gang-related offense or a finding on a gang allegation.

[Citation.]" (*People v. Ferraez* (2003) 112 Cal.App.4th 925, 930.) Moreover, expert opinion may consist of inferences and conclusions that cannot be easily drawn by persons without specialized knowledge. (See *People v. Torres* (1995) 33 Cal.App.4th 37, 45; Evid. Code, § 801.) An expert may render an opinion based upon a hypothetical question, so long as the question is based upon facts shown by the evidence. (*Gardeley*, *supra*, 14 Cal.4th at p. 618.)

Flores does not clearly set out the challenged inferences or show that they should have been left to the jury to draw, nor does he refer to the pages in the record where they might be found. Flores merely complains: "Detective Sarti defined Compitas as a criminal street gang, he described its 'criminal activity'; he explained its members' intent to intimidate, and he opined that [defendants] were Compitas gang members and that the crimes they committed were 'to benefit' the Compitas gang." Flores's argument is insufficiently developed to permit any reasoned discussion of it, and we reject it on that basis. (See *People v. Turner* (1994) 8 Cal.4th 137, 214, fn. 19.)

V. No abuse of discretion in spectator identification

Flores contends that the trial court erred by overruling his objection under Evidence Code section 352 and admitting Detective Sarti's testimony that one of the trial spectators was a Compitas gang member. Flores contends that Detective Sarti's testimony was highly prejudicial when considered with the victims' testimony regarding their fear of testifying, as well as with an earlier incident in which deputies spoke to several courtroom spectators as a matter of courtroom security (court security incident). He argues that the combination of these circumstances rendered his trial unfair and resulted in a denial of due process.[4]

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[4] A decision made under the ordinary rules of evidence does not ordinarily implicate constitutional rights. (*People v. Dement* (2011) 53 Cal.4th 1, 52.) As Flores did not make a constitutional argument below, we do not reach his due process claim unless and until he establishes error under state law. (*People v. Thornton* (2007) 41 Cal.4th 391, 443-444; *People v. Partida* (2005) 37 Cal.4th 428, 435-439.)

Evidence Code section 352 provides in relevant part that the trial "court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will . . . create substantial danger of undue prejudice . . . ." A trial court has broad discretion in determining whether to admit or exclude evidence objected to on the basis of this section. (*People v. Anderson* (2001) 25 Cal.4th 543, 591.) The court's discretion will not be disturbed unless it was exercised "'in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. [Citations.]' [Citation.]" (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125 (*Rodrigues*).)

Initially we observe that defendants did not object under Evidence Code section 352 to the victims' testimony regarding their fear of testifying and the spectator identification incident. Defense counsel objected as leading to the following question the prosecutor asked Rodriguez: "Do you feel scared now, too?" Counsel objected as calling for speculation to the prosecutor's question to Tapia, "What are you scared of?" Moises testified without objection that he found it "scary coming to testify in front of them . . . ." When the prosecutor asked what he feared they would do, counsel objected to the question as calling for speculation. Not only were there no objections based on Evidence Code section 352, the questions were relevant and proper. "Evidence that a witness is afraid to testify or fears retaliation for testifying is relevant to the credibility of that witness and is therefore admissible. [Citations.] An explanation of the basis for the witness's fear is likewise relevant to [his or] her credibility and is well within the discretion of the trial court." (*People v. Burgener* (2003) 29 Cal.4th 833, 869; Evid. Code, § 780.) Flores does not contend that the testimony was erroneously admitted over his objections made on speculation and leading grounds.

The court security incident occurred when defense counsel complained that bailiffs had been identifying people, including Flores's mother and brother-in-law, in the hallway within view of the jury, and that Detective Sarti had spoken to a member of the audience inside the courtroom. Frias's counsel argued to the trial court that the hallway identifications were inflammatory and asked it to prohibit random searches of persons in

the jury's presence. The trial court found nothing improper and explained that as the courtroom was located on a secure floor, it was the policy of the sheriff's department to identify persons entering the courtrooms.[5] The prosecutor then informed the court that there were members of the Compitas gang in the audience and that she intended to ask the expert witnesses about them. Frias's counsel objected without stating a ground. The trial court noted the objection, but did not rule.

Later, when Flores objected to Detective Sarti's identification of audience member Robert Fuentes as a Compitas gang member, he stated the grounds as prejudicial and irrelevant under Evidence Code section 352, but did not ask the court to weigh its probative value against the combined prejudicial effect of the identification, the evidence of the victims' fear, and the incident involving the security of the courtroom. An objection to evidence should be stated so as to make clear the specific ground of the objection. (Evid. Code, § 353.) This means that an objection must be stated with "sufficient specificity of evidence and legal grounds for the opposing party to respond if necessary, for the trial court to determine the question intelligently, and for the appellate court to have a record adequate to review for error." (*People v. Ramos* (1997) 15 Cal.4th 1133, 1172.)

In essence, Flores seeks review of a decision he never asked the trial court to make. We agree with respondent that the trial court did not abuse the discretion that it was asked to exercise as the testimony was relevant to bolster Detective Sarti's expert opinion, particularly since Frias had just presented the testimony of defense gang expert, Estevane, which conflicted in many key respects with the testimony of Detective Sarti.

In addition, we agree with respondent that the identification of the spectator as a gang member was relevant to the assessment of the witnesses who testified that they were in fear of retaliation. Rodriguez testified that defendants were gang members which frightened him during the robbery; he felt the same fear while testifying. Tapia was

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[5] The trial court offered three times to admonish the jury, but neither defense counsel accepted the offer.

afraid that "these guys" might come after his family and friends and he would have to hide. Similarly, Moises feared that "they" might shoot him or come after his family. It is not necessary to show that '"the witness's fear of retaliation is directly linked to the defendant for the evidence to be admissible.' [Citation.]" (*People v. Sapp* (2003) 31 Cal.4th 240, 281, quoting *People v. Olguin, supra,* 31 Cal.App.4th at p. 1368.)

We conclude that defendant has failed to show that the trial court abused its discretion or that his due process rights were violated. (See *People v. Thornton, supra,* 41 Cal.4th at pp. 443-444.)

VI. Expert's reliance on hearsay appropriate

Flores contends that Detective Sarti's opinion testimony should have been excluded in its entirety as violating the confrontation clause of the Sixth Amendment to the United States Constitution. Flores contends that Detective Sarti's gang expertise came from hearsay sources that included statements given in police initiated "Field Interviews" which qualified as testimonial hearsay. Although Flores did not object on Sixth Amendment grounds in the trial court, he now relies on *Crawford v. Washington* (2004) 541 U.S. 36, in which the United States Supreme Court held that the Sixth Amendment bars the "admission of testimonial statements of a [declarant] who [does] not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." (*Id.* at pp. 53-54, 68.)

A failure to raise a confrontation clause claim in the trial court forfeits the issue on appeal. (*People v. Redd* (2010) 48 Cal.4th 691, 730.) Flores contends that his failure to raise the claim below should be excused because any such objection would have been futile in light of the California Supreme Court's holding in *Gardeley, supra,* 14 Cal.4th at page 618, that an expert may base an opinion on inadmissible hearsay so long as the information is reliable. We agree that the trial court would have considered itself bound by *Gardeley* under the doctrine of stare decisis -- as do we. (See *Auto Equity Sales, supra,* 57 Cal.2d at p. 455.) Thus, had Flores not forfeited the issue we would nevertheless reject post-*Crawford* challenges to *Gardeley* on the same basis (E.g., *Hill,*

supra, 191 Cal.App.4th at p. 1128; *People v. Ramirez* (2007) 153 Cal.App.4th 1422, 1426-1427; *People v. Thomas* (2005) 130 Cal.App.4th 1202, 1208-1210.)

We also reject Flores's request that we weigh the probative value of the gang expert's opinion against its prejudicial effect. Flores's failure to raise an objection based on Evidence Code section 352 in the trial court forfeits such a challenge. (*People v. Zapien* (1993) 4 Cal.4th 929, 979-980.) Flores concedes that judicial discretion under Evidence Code section 352 has always been available to limit the prejudicial effect of the hearsay basis of a gang expert's opinion (see *Gardeley*, *supra*, 14 Cal.4th at p. 619) but contends that his failure to object should be excused in order to consider the new approach recently suggested in *People v. Archuleta* (2011) 202 Cal.App.4th 493, review granted March 28, 2012, S199979. We decline the request as the California Supreme Court has granted review in that case and it may no longer be cited. (Cal. Rules of Court, rule 8.1105(e)(1).)

Flores contends that his trial counsel's performance was deficient due to the failure to object to the hearsay evidence on which the gang expert relied in forming his opinion, thus depriving Flores of effective assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution and the California Constitution, article I, section 15. Flores concedes that any such objection would have been futile. Counsel's failure to make futile objections does not render his assistance ineffective. (*People v. Price* (1991) 1 Cal.4th 324, 386-387.)

VII. Substantial evidence supports firearm allegation

Flores contends that the jury's true finding that he personally used a firearm was not supported by substantial evidence because the evidence showed at most that he was merely armed with a firearm. He thus concludes that the 10-year sentence enhancement imposed must be stricken.

Section 12022.53, subdivision (c), provides for a 20-year sentence enhancement for personally and intentionally discharging a firearm in the commission of a robbery or other specified felony. That enhancement must be imposed upon any other principal in the robbery if that person falls within section 186.22, subdivision (b), provided that,

under such a circumstance, the gang enhancement shall not also be imposed on a defendant who did not personally use a firearm during the commission of the robbery. (§ 12022.53, subd. (e).)

As used in the enhancement statutes, a defendant may be "armed" simply by having a firearm available for use. (*People v. Bland* (1995) 10 Cal.4th 991, 997.) On the other hand, "'[a]lthough the use of a firearm connotes something more than a bare potential for use, there need not be conduct which actually produces harm but only conduct which produces a fear of harm or force by means or display of a firearm in aiding the commission of one of the specified felonies. "Use" means, among other things, "to carry out a purpose or action by means of," to "make instrumental to an end or process," and to "apply to advantage." [Citation.]'" (*Ibid*.)

Whether defendant used a firearm or was merely armed, presents a question of fact for the jury. (*People v. Masbruch* (1996) 13 Cal.4th 1001, 1007.) We apply the usual substantial evidence standard to review the sufficiency of the evidence to support a firearm enhancement, presuming every fact the jury could reasonably have deduced from the evidence. (*People v. Wilson* (2008) 44 Cal.4th 758, 806 (*Wilson*).)

Flores contends that the evidence showed that he merely passed the gun to Frias without intentionally pointing it at the victims. However, the prosecution was not required to prove that he pointed the gun or used it to expressly threaten any of the victims. (*Wilson, supra*, 44 Cal.4th at p. 807.) "'Thus when a defendant deliberately shows a gun, or otherwise makes its presence known, and there is no evidence to suggest any purpose other than intimidating the victim (or others) so as to successfully complete the underlying offense, the jury is entitled to find a facilitative use rather than an incidental or inadvertent exposure. The defense may freely urge the jury not to draw such an inference, but a failure to actually point the gun, or to issue explicit threats of harm, does not entitle the defendant to a judicial exemption from [the enhancement].' [Citations.]" (*Ibid.*; see also *People v. Bryant* (2011) 191 Cal.App.4th 1457, 1472.)

Thus Flores is mistaken in his suggestion that the evidence was insufficient without proof that he pointed the gun. Moreover, Flores is mistaken in his facts. Tapia

testified that after Frias told Flores to pull out "the gun" Flores took it out and pointed it at Moises before passing it to Frias.

Flores acknowledges Tapia's testimony, but contends that Tapia clarified his testimony by stating that it was Frias who pointed the gun at him and Moises. We disagree. Tapia clarified his testimony, but he did not change it. Tapia identified Frias as the defendant wearing green and Flores as the defendant wearing black. He testified that the "guy with the green sweater" yelled out, "Take out the gun." Then the "other guy just took it out, and he was just holding it [and] pointing it at Moises." The prosecutor asked, "Which one of the two defendants was pointing it at Moises?" Tapia replied, "It was the guy with the black shirt." Asked for the next thing he remembered, Tapia said, "The guy with the green sweater took the gun from the guy, and he just walked up to us, and pointed it at both . . . me and Moises."

Further, as soon as Frias took the gun, Frias pointed the gun while both defendants reached into the victims' pockets and demanded the contents. The gun display did not need to be simultaneous with Flores's demand for property or his reaching into a victim's pocket; the initial display of the weapon, followed immediately by the demand and search after passing the gun to Frias, was sufficient. (See *Wilson*, *supra*, 44 Cal.4th at p. 807.) Thus substantial evidence showed that Flores deliberately made the presence of the gun known for the purpose of intimidating the victims into handing over their possessions. We conclude from such circumstances that substantial evidence supported the jury's finding that Flores personally used a firearm in the commission of the robbery, and thus the enhancement was proper.

VIII. No abuse of discretion in imposing upper, consecutive, and enhanced terms

Defendants contend that the trial court abused its sentencing discretion by not striking gang enhancements and by imposing the terms consecutively. In addition, Flores contends that the trial court applied improper and duplicate aggravating factors to impose upper terms; abused its discretion by sentencing him as a second strike offender; and improperly imposed multiple gang enhancements.

As Flores did not raise these issues in the trial court he has failed to preserve them for review. (*People v. Gonzalez* (2003) 31 Cal.4th 745, 755; *People v. Scott* (1994) 9 Cal.4th 331, 356.) He contends, however, that trial counsel rendered ineffective assistance of counsel due to his failure to raise the issues in the trial court. With the exception of three undeveloped issues, we reach them only to counter defendant's claim of ineffective counsel. (*Rodrigues, supra*, 8 Cal.4th at pp. 1125-1126.)

One of the undeveloped issues is Flores's contention that consecutive sentences were an abuse of the trial court's discretion, he does not discuss the issue further, except in relation to the gang enhancements. As respondent notes, consecutive sentences were appropriate as there were several victims. (See *People v. Calhoun* (2007) 40 Cal.4th 398, 408; *People v. Leon* (2010) 181 Cal.App.4th 452, 468.)

In addition, without analysis, Flores contends that the imposition of multiple enhancements violated the protection against double jeopardy afforded by the United States Constitution. As Flores makes no attempt to show that the enhancements imposed here define offenses that are subject to double jeopardy (see *People v. Izaguirre* (2007) 42 Cal.4th 126, 130-134), we do not address this contention. Two other issues are insufficiently developed to warrant discussion. (See *People v. Medrano* (2008) 161 Cal.App.4th 1514, 1520.)

Flores also contends that his trial counsel rendered constitutionally ineffective assistance by failing to bring a "*Romero*" motion. (See *People v. Superior Court (Romero)* 13 Cal.4th 497.) However, he does not attempt to show that such a motion might have had merit, as he must to obtain a reversal on this ground. (See *Strickland v. Washington* (1984) 466 U.S. 668, 694; *Rodrigues, supra*, 8 Cal.4th at p. 1126.)

In reviewing the remaining issues, we presume that the trial court acted to achieve legitimate sentencing objectives, and thus its sentencing choice is reviewed for abuse of discretion. (*People v. Jones* (2009) 178 Cal.App.4th 853, 859-860; *People v. Lamb* (1988) 206 Cal.App.3d 397, 401 (*Lamb*).) A trial court's discretion will not be disturbed on appeal unless the party attacking the sentence clearly shows that the sentencing decision was '"so irrational or arbitrary that no reasonable person could agree with it.'

[Citation.]" (*People v. Jones, supra,* at pp. 860 -861, quoting *People v. Carmony* (2004) 33 Cal.4th 367, 377.)

A . Upper terms were properly imposed

Flores contends that the trial court applied improper aggravating factors to impose the upper term as to count 1. The trial court sentenced Flores to the high term of five years in prison due to Flores's "escalating criminal behavior [and] the vulnerability of the victims."

A sentencing court has broad discretion to impose the lower, middle, or upper terms of imprisonment, and to weigh various aggravating and mitigating factors. (*People v. Black* (2007) 41 Cal.4th 799, 813, 822; *Lamb*, *supra*, 206 Cal.App.3d at p. 401; § 1170, subd. (b).) The court may consider the factors set forth in the California Rules of Court, rule 4.421, or any other fact "reasonably related to the decision being made," so long as the same fact is not used to aggravate a term and impose an enhancement. (§ 1170, subd. (b); Cal. Rules of Court, rules 4.408(a), 4.420(b).) A single aggravating factor will justify the imposition of the upper term. (*People v. Osband* (1996) 13 Cal.4th 622, 728.)

A finding that the victim was particularly vulnerable will justify the upper term. (Cal. Rules of Court, rule 4.421(a)(3).) A "'particularly vulnerable"' victim is one who is vulnerable "in a special or unusual degree, to an extent greater than in other cases. Vulnerability means defenseless, unguarded, unprotected, accessible, assailable, one who is susceptible to the defendant's criminal act." (*People v. Smith* (1979) 94 Cal.App.3d 433, 436.) Here the trial court found the victims particularly vulnerable based upon its observations of the victims while testifying, concluding that defendants chose obviously "weak prey": four harmless "young kids"[6] who were not gang members, just "hanging out, enjoying their day"; and defendants immediately placed them in fear for their lives from gang members by asking, "Where are you from?"

Flores contends that the victims were not *particularly* vulnerable because they "were not young, old, disabled, isolated, unconscious, or vulnerable 'in a special or

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6 The record reflects that at least one victim, Moises, was a minor.

unusual degree, to an extent greater than in other cases.'" As examples of such other cases, Flores cites cases involving an isolated rape victim (*People v. Burrell-Hart* (1987) 192 Cal.App.3d 593, 601), a sleeping victim (*People v. Loudermilk* (1987) 195 Cal.App.3d 996, 1007), children at a daycare center (*People v. Hetherington* (1984) 154 Cal.App.3d 1132, 1141-1142), and spousal trust (*People v. Clark* (1990) 50 Cal.3d 583, 638). Targeting teenage boys fearful of gangs may not compare to targeting children at a daycare center, but we cannot conclude that the use of this factor was arbitrary or capricious.

Moreover, the second factor challenged by Flores was clearly proper. Flores acknowledges that the trial court's finding of "escalating criminal behavior" was the equivalent of the properly considered aggravating factor that a defendant's prior convictions or sustained juvenile delinquency petitions were of increasing seriousness. (See Cal. Rules of Court, rule 4.421(b)(2).) However, he contends that the evidence did not support the trial court's finding because his juvenile convictions for resisting arrest and vandalism were not increasingly serious. We disagree.

As Flores points out, the trial court could not properly consider the prior robbery conviction, as it was used to impose a second strike term. (See § 1170, subd. (b).) However, the trial court was entitled to consider his current crimes. (See *People v. Thompson* (1990) 222 Cal.App.3d 1647, 1652.) Thus, as the trial court properly found that Flores's criminal behavior, which began with resisting arrest and vandalism, has escalated to robbing the three victims in this case, the imposition of the upper term under this circumstance was not an abuse of discretion.

B. Multiple gang enhancements were justified by multiple victims

Flores contends that the trial court erred in failing to apply section 654. Relying on *Neal v. State* (1960) 55 Cal.2d 11, 19 (*Neal*), Flores argues that only one gang enhancement may be imposed because the robbery of the three victims was a single, indivisible course of conduct, each undertaken with the single intent of an objective of acting for the benefit or at the direction of, or in association with his gang. Respondent

contends that the multiple victim exception is applicable here.[7] (See *People v. Oates* (2004) 32 Cal.4th 1048, 1063-1064 (*Oates*).)

"An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." (§ 654, subd. (a).) Section 654 is applicable to enhancements that go to the nature of the offense "when the specific statutes do not provide the answer." (*People v. Ahmed* (2011) 53 Cal.4th 156, 162-163.)

Section 654 does not apply to crimes of violence against multiple victims. (*People v. Correa* (2012) 54 Cal.4th 331, 343 (*Correa*).) The multiple victim exception is applicable to a single act of violence committed against multiple victims, even when the defendant harbored the same intent and objective. (*Oates*, *supra*, 32 Cal.4th at pp. 1063-1064.) Robbery is a violent crime. (*People v. Hall* (2000) 83 Cal.App.4th 1084, 1090.)

When section 654 applies to enhancements, the multiple victim exception is also applicable, so long as neither the enhancement statute nor its legislative history suggests a legislative intent "to treat a term enhancement 'more restrictively for multiple punishment purposes than the term for the underlying offense.' [Citation.]" (*Oates*, *supra*, 32 Cal.4th at p. 1066, quoting *People v. King* (1993) 5 Cal.4th 59, 78.) No such intent appears in the language of section 186.22, subdivision (b), which provides that "any person who is convicted of *a felony* committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote,

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[7] We decline to consider Flores's invitation to compare gang enhancements with conspiracy law. (See § 182.) Section 182 and section 186.22, subdivision (b), are too dissimilar to permit comparison. (Cf. *In re Alberto R.* (1991) 235 Cal.App.3d 1309, 1324 ["different breed of animal"].) In addition, we reject Frias's strained comparison to *People v. Mesa* (2012) 54 Cal.4th 191, in which the California Supreme Court held that section 654 prohibited punishment for both the crime of participation in a criminal street gang (§ 186.22, subd. (a)), and assault with a firearm when both crimes were based upon shooting the victim. As neither the gang enhancement under section 186.22, subdivision (a), nor the multiple victim exception was at issue in the case, there is simply no analogy to be drawn.

further, or assist in any criminal conduct by gang members, shall, upon conviction of *that felony* . . . be [subject to the sentence enhancement]." (Italics added.) Notably, the statute does not call for the imposition of a single sentence enhancement upon a person who is convicted of a series of felonies with the same gang motive and intent. Nor does legislative history indicate an intent to treat gang enhancements more restrictively, as the Legislature intended to increase punishment in response to the terror and violence inflicted on the community by gang activity. (See *People v. Akins* (1997) 56 Cal.App.4th 331, 341 (*Akins*).)

Relying on *Akins*, Flores contends that the multiple victim exception does not permit multiple gang enhancements unless the crimes of violence were distinct and separated by time and distance. *Akins* did not involve one simultaneous robbery of several victims, as in this case. (See *Akins, supra*, 56 Cal.App.4th at pp. 339-340.) However, while not expressly naming the multiple victim exception, the court made clear that the result would have been no different had the robberies taken place at the same time when it pointed out that "[m]ultiple acts of violence committed against separate victims may be separately punished, even when they are for the same intent and during the same transaction." (*Id.* at pp. 340-341, citing *People v. Perez* (1979) 23 Cal.3d 545, 553.) The court concluded that section 654 was not applicable, and thus a separate gang enhancement was properly applied to each separate robbery despite a gang objective common to all. (*Akins, supra*, at pp. 340-341.)

A defendant who commits a violent crime against several victims is more culpable that a defendant who commits a violent crime against one person, regardless of his intent or objective. (*Oates, supra*, 32 Cal.4th at p. 1063.) The multiple victim exception promotes section 654's purpose that a defendant's punishment will be commensurate with his culpability. (*Oates*, at p. 1063.) Likewise, multiple enhancements ensure that a defendant will not be treated less severely because he chooses to rob several victims to benefit his gang rather than just one victim. (Cf. *People v. King, supra*, 5 Cal.4th at pp. 73-74.) We conclude that where there were multiple victims, each robbery conviction is subject to a gang enhancement.

C. Flores: no ineffective assistance of counsel

Flores contends that his trial counsel failed to render effective assistance as guaranteed by the United States and California Constitutions because he failed to object to the trial court's sentencing choices. (See U.S. Const., 6th Amend.; Cal. Const., art. I, § 15.) It is the defendant's burden to establish constitutionally inadequate assistance of counsel. (*Strickland v. Washington*, *supra*, 466 U.S. at p. 687.) To meet that burden, he must show both of the following: "(1) that counsel's representation fell below an objective standard of reasonableness; *and* (2) that there is a reasonable probability that, but for counsel's unprofessional errors, a determination more favorable to defendant would have resulted. [Citations.]" (*People v. Rodrigues*, *supra*, 8 Cal.4th at p. 1126.)

Flores has made neither showing as we have found no merit to any of Flores's objections to the trial court's sentencing choices. Counsel's failure to make a futile or unmeritorious motion or objection is not ineffective assistance. (*People v. Price*, *supra*, Cal.4th at p. 387.) In addition, Flores cannot show that the result would have been different had futile objections been made to the trial court. We thus reject the claim of ineffective assistance of counsel.

D. Frias: no abuse of discretion in consecutive sentencing or refusal to strike prior conviction[8]

Frias contends that the trial court abused its discretion by imposing consecutive terms as to counts 2 and 3 because the crimes occurred as a single, continuous transaction with a common objective and goal, and lasted only a few minutes. First, Frias sets forth California Rules of Court, rule 4.425, which suggests criteria for the trial court to

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8 Frias apparently anticipates an argument that section 12022.53, subdivision (c), precludes the court from imposing concurrent terms for the crimes underlying the enhancement. The trial court may run the underlying offense concurrently or consecutively, as long as the court treats the enhancement in the same manner. (Cf. *People v. Phong Bui* (2011) 192 Cal.App.4th 1002, 1016.) Respondent does not contend otherwise.

consider when deciding whether to impose concurrent or consecutive terms.[9] Although Frias demonstrates that the facts of this case do not fit any of the specific criteria, the rule provides that the trial court may base its decision on any other facts, with specified exceptions not claimed here. (See Cal. Rules of Court, rule 4.425(b).) Indeed, Frias concedes that the trial court may properly rely on the fact that the crimes involved multiple victims. (See *People v. Shaw* (2004) 122 Cal.App.4th 453, 458-459.) As there were multiple victims in this case, we find no abuse of discretion.

Frias also contends that that trial court should have imposed the terms on all counts concurrently and should have stricken the gang enhancements. He reasons that the crimes were merely a "tangentially related gang crime" because "defendants were not seeking revenge against rival gang members [and] [t]he yelling of the gang name appeared to be an afterthought rather than the motivation for the crime." Frias also suggests that the court abused its discretion because current prison terms would be enough punishment in this case, as the amount to be served would still be a lengthy 38 years.

Frias fails to explain why defendants' choice of the victims here warranted a lesser punishment than had they robbed rival gang members. Further, the jury found true beyond a reasonable doubt that the crimes were gang related, not that they were "tangentially" gang related, and we have found that substantial evidence supported that finding. Finally, Frias cites no authority to support the proposition that a sentence

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9 "Criteria affecting the decision to impose consecutive rather than concurrent sentences include: [¶] (a) . . . Facts relating to the crimes, including whether or not: [¶] (1) The crimes and their objectives were predominantly independent of each other; [¶] (2) The crimes involved separate acts of violence or threats of violence; or [¶] (3) The crimes were committed at different times or separate places, rather than being committed so closely in time and place as to indicate a single period of aberrant behavior. [¶] (b) . . . Any circumstances in aggravation or mitigation may be considered in deciding whether to impose consecutive rather than concurrent sentences, except: [¶] (1) A fact used to impose the upper term; [¶] (2) A fact used to otherwise enhance the defendant's prison sentence; and [¶] (3) A fact that is an element of the crime may not be used to impose consecutive sentences." (Cal. Rules of Court, rule 4.425.)

constitutes an abuse of discretion simply because it is lengthy. We conclude that he has not met his burden of establishing that the trial court's sentencing decisions were irrational or arbitrary. (See *People v. Carmony, supra*, 33 Cal.4th at p. 377.)

Frias also contends that consecutive sentences were an abuse of discretion because they resulted in a cruel and unusual punishment prohibited by the Eighth Amendment to the United States Constitution. We discuss that contention in the next section.

IX. Cruel or unusual punishment

Defendants contend that their sentences constitute cruel and unusual punishment under the Eighth Amendment to the United States Constitution and cruel or unusual punishment under article I, section 17 of the California Constitution.

Such claims must be made in the first instance in the trial court. (*People v. Burgener, supra*, 29 Cal.4th at pp. 886-887.) Respondent contends that defendants have forfeited their constitutional claims by failing to raise them below. Flores does not dispute his failure to raise the issue, but Frias points out that he raised the issue in his sentencing memorandum. For convenience, we discuss both claims as both defendants incorporate the arguments of the other.

As an initial matter, we note that defendants were 20-year-old adults at the time of their crimes. However defendants ask that we analyze the issue under both the California and United States Constitutions as though they had been juveniles at the time, by applying the principles enunciated in *Graham v. Florida* (2010) 560 U.S. ___ [130 S.Ct. 2011], in which the United States Supreme Court held that a sentence of life without parole (LWOP) for any juvenile offender who did not commit a homicide is prohibited under the Eighth Amendment. Defendants also invoke *People v. Mendez* (2010) 188 Cal.App.4th 47, in which this court observed that "common sense dictates" that a juvenile who is not eligible for parole until beyond his life expectancy, currently 76 years for men, does not have a meaningful opportunity to obtain release. (*Id.* at pp. 62-63; see also *People v. Caballero* (2012) 55 Cal.4th 262.) Defendants were adults, and we decline their invitation to pretend otherwise.

A. California Constitution

Under the California Constitution, punishment is cruel or unusual if it is so disproportionate to the crime committed that it shocks the conscience and offends fundamental notions of human dignity. (*People v. Dillon* (1983) 34 Cal.3d 441 (*Dillon*); *In re Lynch* (1972) 8 Cal.3d 410, 424 (*Lynch*).) Following *Dillon* and *Lynch*, California courts have developed three categories of review to determine whether a sentence is cruel or unusual: "(1) the nature of the offense and the offender, with particular regard to the degree of danger which both present to society; (2) a comparison of the challenged penalty with the punishment prescribed in the same jurisdiction for other more serious offenses; and (3) a comparison of the challenged penalty with the punishment prescribed for the same offense in other jurisdictions." (*People v. Mantanez* (2002) 98 Cal.App.4th 354, 359; *Lynch*, *supra*, at pp. 425-428.)

A defendant "must overcome a 'considerable burden' in convincing us his sentence was disproportionate to his level of culpability. [Citation.]" (*People v. Weddle* (1991) 1 Cal.App.4th 1190, 1197.) We conclude that defendants have failed to carry their burdens.

1. Flores

With regard to his individual culpability Flores argues that his youth and state of mind indicated a lesser degree of culpability. Flores claims that he was "merely two years older" than *Dillon*, the "unusually immature" 17-year-old defendant with no criminal history, whose life sentence for murder was found to violate the California Constitution in *Dillon, supra,* 34 Cal.3d at pages 487-488. Flores contends that his 68-year sentence should not have been more onerous than Dillon's life sentence for the more serious crime of murder because the parole eligibility period would be longer. With regard to state of mind, Flores argues that the evidence failed to show that he intended that his codefendant fire the weapon or that either defendant intended to shoot anyone. Such an argument falters on the facts: Flores was an adult member of a criminal street gang when he committed three counts of robbery in association with his gang; he was carrying a loaded firearm, which he handed to his fellow gang member after pointing it at

one of his young victims; and he admitted that hardly more than one year before the current crimes, he was convicted of another robbery.

Not only is Flores's comparison to the youthful Dillon inapt, it disregards the question of recidivism, which must be taken into account in the analysis. (*People v. Gray* (1998) 66 Cal.App.4th 973, 992.) A comparison that ignores the "Three Strikes" law is "misguided" and will not support a constitutional challenge. (*People v. Cartwright* (1995) 39 Cal.App.4th 1123, 1136-1137.)

With regard to punishments in other jurisdictions, Flores does not compare his sentence to those imposed elsewhere for the same offense. (See *Lynch*, *supra*, 8 Cal.3d at p. 427.) Instead, he undertakes a comparison of minimum parole periods in other states, without regard to any particular offense, the enhancements, the number of offenses, or the punishment prescribed in other states under similar circumstances. Not only is such a comparison lacking in helpfulness, Flores once again disregards his recidivism. We conclude that Flores has failed to overcome his burden in convincing us his sentence was disproportionate to his level of culpability as a violent recidivist. (See *People v. Weddle*, *supra*, 1 Cal.App.4th at p. 1197.)

2. Frias

Apparently addressing the nature of the offense and the offender (see *Lynch*, *supra*, 8 Cal.3d at pp. 425-426), Frias compares himself to juvenile offenders and quotes letters written on his behalf about his difficult childhood, his anger over his brother's violent death, his near-illiteracy, and his efforts to improve himself. Frias points out that in the statement he read to the court he apologized for his actions, claimed to have been intoxicated at the time of the robberies, and denied that the crimes were gang related. However, Frias disregards the trial court's rejection of his statements as not worthy of belief. The court expressly found that he was lying to the court, calling him a "master manipulator" who had not come to terms with his crimes and was "totally minimizing [his] conduct"; the court referred to Frias's statement to the court as "poetic." While the question whether a sentence is so grossly disproportionate to a particular defendant's individual culpability as to constitute cruel or unusual punishment is ultimately one of

law, we defer to the trial court's factual findings and resolution of credibility issues. (*People v. Mora* (1995) 39 Cal.App.4th 607, 615.)

Here, while purporting to acknowledge that his offenses were serious, Frias in fact minimizes them by referring to the robberies as one offense, claiming that the victims were not injured because they were only frightened, claiming that the robbery was not planned, and suggesting that he merely brandished his weapon. As Frias's continuing attempt to minimize his own culpability and the circumstances of his crimes pays no "particular regard to the degree of danger which both present to society," he has failed to meet his burden under the first *Dillon*/*Lynch* category. (*People v. Mantanez*, *supra*, 98 Cal.App.4th at p. 359.)

Frias's analysis under the second *Dillon*/*Lynch* category fares no better. Frias compares his sentence with various punishments prescribed in other jurisdictions. (See *Lynch*, *supra*, 8 Cal.3d at pp. 427-428.) However, he compares his sentence of 54 years against a single similar offense in other jurisdictions, not against three counts of robbery committed by an adult gang member in association with a criminal street gang, using a loaded firearm which he intentionally discharged in the victims' direction. A comparison that does not take into account all offenses and circumstances that went into the defendant's punishment fails this prong of the *Dillon*/*Lynch* test. (*People v. Crooks* (1997) 55 Cal.App.4th 797, 808-809.)

We conclude that Frias has failed to overcome his burden in convincing us his sentence was disproportionate to his level of culpability. (See *People v. Weddle*, *supra*, 1 Cal.App.4th at p. 1197.)

B. Eighth Amendment

Although the analysis under the federal Constitution is similar to the analysis under the California Constitution, the Eighth Amendment does not require an individualized proportionality review unless the punishment gives rise to an inference that it is grossly disproportionate to the crime. (*Harmelin v. Michigan* (1991) 501 U.S. 957, 995-996 (*Harmelin*).) For adults, no such inference arises from a sentence of less than death. (*Ibid*.) Successful proportionality challenges to noncapital sentences are and

should be '"exceedingly rare."' (*Ewing v. California* (2003) 538 U.S. 11, 22, quoting *Rummel v. Estelle* (1980) 445 U.S. 263, 374; see also *Harmelin, supra,* at pp. 995-996, & 1001 (conc. opn. of Kennedy, J.).) A defendant has a "considerable burden" to show that his punishment was cruel and unusual. (*People v. Wingo* (1975) 14 Cal.3d 169, 174.)

Defendants were adults and were sentenced to terms less than death. Further, we have concluded that defendants failed to meet their burden to show that their punishment was so disproportionate to their crimes as to shock the conscience or offend fundamental notions of human dignity under the *Dillon*/*Lynch* test. (See *Lynch, supra,* 8 Cal.3d at p. 424; *Dillon, supra,* 34 Cal.3d at pp. 478-479.) Thus, no inference of gross disproportionality arose. (*Harmelin, supra,* 501 U.S. at pp. 995-996.) As defendants' effort to create such an inference is based solely upon the false premise that young adults are juveniles, we conclude that they have not met their "considerable burden" to show that their punishment was cruel and unusual under the Eighth Amendment. (See *People v. Wingo, supra,* 14 Cal.3d at p. 174.)

DISPOSITION

The judgments are affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

We concur:

_____, Acting P. J.
DOI TODD

_____, J.
ASHMANN-GERST